UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ADVANCEPIERRE FOODS, INC.,

"Respondent"

and

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 75, AFFILIATED WITH THE UNITED FOOD AND COMMERCIAL WORKERS, INTERNATIONAL UNION,

"Charging Party"

Cases 9-CA-153966
9-CA-153973
9-CA-153986
9-CA-154624
9-CA-156715
9-CA-156746
9-CA-159692
9-CA-160773
9-CA-160779
9-CA-162392

BRIEF OF RESPONDENT, ADVANCEPIERRE FOODS, INC., TO THE NATIONAL LABOR RELATIONS BOARD IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF ADMINISTRATIVE LAW JUDGE DAVID I. GOLDMAN

Respectfully submitted,

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I. INTRODUCTION

Pursuant to Sections 102.46 and 102.69(c)(2) of the Board's Rules and Regulations, Respondent AdvancePierre Foods, Inc. ("APF" or "Company" or "Respondent") has filed Exceptions to the Decision of the Administrative Law Judge, David I. Goldman in the above cases (JD-58-16) ("Decision"). This Brief is being filed in support of Respondent's Exceptions.

Stated briefly, Administrative Law Judge David I. Goldman ("ALJ") incorrectly determined that APF surveilled the distribution of Union literature in its cafeteria and that it interrogated and disciplined Carmen Cotto ("Cotto") and Sonja Guzman ("Guzman") in violation of the National Labor Relations Act ("Act"). The ALJ's conclusions that APF's clipboard audit on June 8, 2015, was an unlawful surveillance in violation of Section 8(a)(1) and that the Company unlawfully disciplined Ronnie Fox in violation of Sections 8(a)(1) and (3) were also incorrect.

Next, the ALJ's findings and conclusions of law that APF unlawfully surveilled Diana Concepcion (a/k/a Yazzmin Trujillo) in violation of Section 8(a)(1) were both factually and legally faulty, because the review of the LaMega website and Trujillo's Facebook page did not constitute unlawful surveillance. Furthermore, the protections of the Act extend in this situation to employees only, and APF's actions here were directed toward a non-employee, a critical point that the ALJ missed in his analysis. In determining that APF also violated Section 8(a)(1) by demanding documentation of identity from Concepcion (a/k/a Trujillo) and by suspending her, the ALJ ignored APF's clear federal immigration obligations and misapplied the *Wright Line* test by concluding that the General Counsel established a *prima facie* case and in effect depriving APF of its *Wright Line* defense.

The ALJ's factual findings and conclusions that APF violated Section 8(a)(1) of the Act by accessing a single attendance point to Jessenia Maldonado and that the Company's usage of

the CATS process constituted a solicitation of grievances in violation of Section 8(a)(1) of the Act were also incorrect. Certain credibility findings of the ALJ were also not well-founded in fact or law, and none were based on demeanor. As to his proposed remedy concerning the re-employment of Diana Concepcion (a/k/a Yazzmin Trujillo), the remedy ignores APF's legal obligation to employ only lawful U.S. workers, thereby forcing APF to potentially violate federal law in connection with her rehire.

II. STATEMENT OF THE CASE

This matter arises out of a Consolidated Complaint against APF based on charges filed by the United Food and Commercial Workers Union Local 75 (the "Union"). The hearing was held in Cincinnati, Ohio, on November 30-December 4, 2015 and on January 14, 2016 before the ALJ, who issued his opinion on June 27, 2016.

III. ISSUES PRESENTED

A. Whether the ALJ properly determined that APF violated Section 8(a)(1) of the Act by watching videotape of activity in the cafeteria and in particular the activity of Cotto. APF's Exceptions to the ALJ Decision (the "Exceptions") 4, 5, 63, 64.

B. Whether the ALJ properly determined that APF violated Sections 8(a)(1) and (3) of the Act by disciplining Cotto and Guzman. Exceptions 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 63, 64.

C. Whether the ALJ properly determined that APF unlawfully interrogated Cotto in violation of Section 8(a)(1) of the Act. Exceptions 3, 4, 5, 6, 7, 8, 13, 14, 63, 64.

D. Whether the ALJ properly determined that APF's clipboard audit constituted unlawful surveillance in violation of Section 8(a)(1) of the Act. Exceptions 18, 19, 20, 21, 22, 23, 63, 64.

E. Whether the ALJ properly determined that APF's issuance of discipline to Ronnie Fox violated Section 8(a)(3) of the Act. Exceptions 18, 19, 20, 21, 22, 23, 24, 25, 63, 64.

F. Whether the ALJ properly found that APF's Facebook searches in connection with a radio show violated Section 8(a)(1) of the Act. Exceptions 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 48, 49, 52, 53, 54, 63, 64.

G. Whether the ALJ's determination that APF's request for documentation to establish the identity of an individual and ultimate suspension of that individual for failing to produce the requested documentation was unlawful retaliation in violation of Sections 8(a)(1) and (3) of the Act. Exceptions 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 63, 64.

H. Whether the ALJ improperly found that APF's assessment of a single attendance point to Jessenia Maldonado violated Section 8(a)(1) of the Act. Exceptions 55, 56, 57, 58, 59, 63, 64.

I. Whether the ALJ improperly determined that APF's implementation of the CATS system was an unlawful solicitation of grievances and implied promises to remedy the grievances in violation of Section 8(a)(1) of the Act. Exceptions 60, 61, 62, 63, 64.

J. Whether the ALJ's remedies of offering Diana Concepcion (a/k/a Yazzmin Trujillo) reinstatement to her prior job and paying her back pay are feasible or legal, given her failure to provide requested documentation to validate her identity. Exceptions 18-54.

IV. FACTUAL BACKGROUND

A. A Union Campaign is Initiated at APF's Cincinnati, Ohio Facility.

APF is a manufacturer of fully-cooked beef, pork and chicken products. (Tr. 663:2-9). Over 600 employees work at its Cincinnati, Ohio facility performing various jobs, such as packer,

machine operator, grinder, box maker and line coordinator. (Tr. 41:13-16; 125:2-10). In May 2015, the UFCW began an organizing campaign at APF's Cincinnati facility. (Tr. 47:1-9).

B. Enforcement of Its Solicitation Policy.

APF's current solicitation policy was implemented on January 1, 2012 (the "2012 Policy"). (Tr. 597:11-598:2; R. Ex. 1). Employees were put on notice of the 2012 Policy when it was posted on the facility's HR bulletin board and published in the employee handbook that was distributed to all employees. (Tr. 599:1-3).

When union activity began at APF's Cincinnati facility in May 2015, Human Resources Director Renee Chernock and Human Resources Manager Mandy Ramirez realized that the 2012 Policy had recently disappeared from the HR bulletin board in the main employee hallway. (Tr. 600:14-19). The bulletin board has no lock on it and is open to the entire employee population. (Tr. 600:2-4). Chernock directed Ramirez to re-post the solicitation policy to the HR bulletin board. (Tr. 601:3-6). Ramirez went to the shared drive on her computer that houses all HR policies, clicked on the solicitation policy and printed it. (Tr. 758:16-759:4). Ramirez then physically posted that policy on the HR bulletin board. (Tr. 758:16-21). Unfortunately, the policy she found and posted was actually a superseded policy from 2001 (the "2001 Policy," G.C. Ex. 25). (Tr. 603:25-604:4; 760:11-22). Ramirez did not realize she was posting an outdated policy at the time. (Tr. 760:11-17).

Ramirez testified that the Company has, since 2010 or 2011, and well before any Union activity, had video cameras in various locations in the facility. (Tr. 562:2-21). She also testified she does not watch live camera footage, but does review archived camera footage in response to employee complaints or other investigations. (Tr. 544:4-10). In response to employee complaints on June 8, Ramirez pulled archived video footage to investigate the complaints. (Tr. 545:14-23; 603:8-16). The video footage showed Cotto distributing papers to her co-workers,

including Guzman. The footage did not show Guzman distributing. (Tr. 545:14-17; 608:3-8). Ramirez consulted Chernock about the complaints and video. (Tr. 602:6-19). Unfamiliar with the legality of her conduct, they reviewed the solicitation policy to understand if Cotto's conduct was permitted by Company policy. (Tr. 603:7-19). Ramirez printed off another copy of the 2001 Policy, and they concluded that the distributions by Cotto violated the 2001 Policy. (Tr. 603:19-23; 604:16-22; 605:7-11). As a result, Chernock and Ramirez called Cotto to Ramirez's office. (Tr. 545:24-546:1; 605:18-21). They explained that employees had complained that Cotto was distributing literature in the cafeteria, and that such activity was not permitted under APF's solicitation policy. (Tr. 546:5-13; 606:1-3). Contrary to Cotto's sworn testimony that she was told she would be suspended or fired for this violation (Tr. 235:12-15), which would have been completely inconsistent with APF's progressive discipline policy, Ramirez and Chernock both testified that, in fact, Cotto was told she would be issued a verbal warning for the policy violation. (Tr. 546:14-16; 609:2-7). Neither Chernock nor Ramirez mentioned the Union or asked Cotto whether she was engaged in activity on behalf of the Union. (Tr. 234:12-15; 610:2-5; 763:4-6; 764:3-9).

Next, Ramirez and Chernock called Guzman to Ramirez's office, as Guzman was seen receiving documents from Cotto. (Tr. 610:22-611:9-13; 764:24-765:14). Ramirez and Chernock reiterated the terms of the 2001 Policy to Guzman. (Tr. 611:24-612:6). Guzman immediately became hostile and accused the HR team of "trying to intimidate her." (Tr. 613:8-9; 765:17-24). Ramirez tried to assuage Guzman's concerns, telling her that they were just having a conversation. (Tr. 613:9-11; 766:8-14). Ramirez and Chernock did not ask Guzman about the Union. (Tr. 343:16-18). The entire conversation lasted less than 3 minutes. (Tr. 614:5-7;

767:16-19). Guzman was not issued any discipline, as she had not been seen distributing any literature. (Tr. 613:17-614:4; 767:2-15).

The following day, June 9, APF discovered that the policy Ramirez had posted and given to each employee was the outdated 2001 Policy. (Tr. 618:4-14; 773:6-10). APF immediately sprang into action to correct its honest mistake. (Tr. 619:1; 773:6-10). Ramirez and Chernock first removed the 2001 Policy from the HR bulletin board and replaced it with the current 2012 Policy. (Tr. 619:1-620:6; 773:11-17). Then Ramirez and Chernock sought out Cotto. (Tr. 619:2-3; 776:22-25). They apologized to her about the mix-up and explained that they had been mistakenly operating under the 2001 Policy when they issued her the verbal warning, and clarified that she was, in fact, permitted to distribute during non-work times in non-work areas. (Tr. 619:2-12; 777:3-8). They gave her a written notice rescinding her verbal warning. (Tr. 621:5-13; 776:3-6; 777:10-13; R. Ex. 3). Ramirez next met with the employees who had been given the superseded 2001 Policy, and notified them of the error and gave each a copy of the current 2012 Policy. (Tr. 779:12-780:1). Neither Ramirez or Chernock met again with Guzman, as she had neither been disciplined under, nor had she requested or been given a copy of the 2001 Policy. (Tr. 621:20-622:6; 778:23-779:11).

C. Credibility of Cotto and Guzman

The ALJ credits the testimony of Cotto and Guzman over that of Ramirez and Chernock on a number of issues. He described Guzman only as a "credible and strong witness" (ALJD 13:44). These credibility determinations are not based on her demeanor and are fundamentally flawed, as well as being inconsistent with the ALJ's findings about their testimony. For example, the ALJ did not believe Cotto's denial that she returned to meet Ramirez and Chernock with Guzman. (ALJD 13, fn. 16). The ALJ found that she had been given a copy of the Policy, even though she testified she did not know whether she had. (ALJD 13:30-31). Cotto testified

the original meeting with Ramirez and Chernock took between 30-45 minutes. (Tr. 226:9-10). The ALJ found it took five minutes. (ALJD 12:1-2).

As to Guzman, both Ramirez and Chernock testified unequivocally that no notice of discipline rescission similar to that given to Cotto was drafted or given to Guzman. (Tr. 622:7-10). Guzman testified definitively that she met again with Ramirez and Chernock, and was in fact given a written notice of rescission. (Tr. 322:2-4). When asked about the whereabouts of this rescission notice, she swore that she threw it away when she cleaned out her locker upon her resignation in September. (Tr. 347:24-348:12). This spoliation will be addressed supra.

D. GMP Audit of Employee Clipboards.

Because APF is a manufacturer of food products, it is subject to strict quality standards and monitored by various federal and state agencies. (Tr. 663:2-18). USDA officials are onsite at its Cincinnati plant, every day. (Tr. 663:19-21). In order to comply with these stringent food quality standards, the Company enforces its Good Manufacturing Practices ("GMP's") (R. Ex. 16), which are a comprehensive list of procedures and policies designed that ensure that its products are safe, and wholesome, and suitable for public consumption. (Tr. 663:22-664:6). Employees are trained on the GMP's and have access to them. (Tr. 665:9-17). Among other things, the GMP's regulate what employees are permitted to bring onto the production floor. (Tr. 664:12-14; R. Ex. 16). Specifically, Section 6.5 prohibits employees from bringing personal property onto the production floor. Toothpicks, chewing gum and medications are specifically referenced in Section 6.5. (Tr. 667:17-20; R. Ex. 16). Employees are only permitted to bring onto the production floor those items that have been issued to them by APF, such as knives, tools for their job, any documentation needed to complete their work, and a box-clipboard. (Tr. 667:13-16; 668:3-8).

Production supervisors and quality employees routinely enforce the GMP's through periodic audits and general supervision of production employees. (Tr. 668:9-23). GMP audits are used to

monitor cleanliness of employee knives, lockout/tagouts, clipboards and toolboxes. (Tr. 670:4-13; 670:22-671:2). For years, APF has been conducting random and monthly GMP audits. (Tr. 670:14-21; 671:9-20). Discipline for GMP violations is typically meted out 2 or 3 times per week by supervisors. (Tr. 669:17-21). Using APF's progressive discipline policy, most initial GMP violators receive a verbal warning. (Tr. 669:22-25).

In June 2015, supervisors reported that employees were distributing union authorization cards on the production floor. (Tr. 643:2-6). Because having personal property on the production floor is a violation of the GMP's, senior plant leadership decided to conduct a GMP audit. (Tr. 643:2-13). The floor supervisors who conducted the audit were not told who was distributing cards, and no directive was given by the Company to search for only union cards as part of the audit. (Tr. 673:2-8). Floor supervisors were simply informed that a GMP audit should be conducted on all shifts. (Tr. 673:9-24). APF would have performed the GMP audit if any type of personal property (i.e., chewing gum, lotion, medication) was being passed out on the production floor. (Tr. 643:6-13).

Supervisor Daran Bishop assisted with the June GMP audit. (Tr. 674:3-6; 676:10-11). Although all employees are expected to make their clipboards (or knives, toolboxes, etc.) available for supervisors to inspect (Tr. 674:7-11), one Line 2 employee, Ronnie Fox, initially refused to allow Bishop to inspect his clipboard. When Bishop approached, Fox blocked his access. (Tr. 676:8-24). When Bishop was finally allowed access to Fox's clipboard, he found union authorization cards inside. (Tr. 675:22-676:4). Fox admitted that he knew that the GMP's prohibited employees from bringing personal items out on the production floor, and that having union cards in his clipboard violated the GMP's. (Tr. 164:23-165:22; Tr. 168:20-25). APF issued

Fox a verbal warning for violation of the GMP's.[1] (Tr. 524:10-17; 547:2-22; 548:21-24). Bishop did not find any other clipboard violations during the GMP audit.[2] (Tr. 677:5-7).

E. APF's Practice of Confirming Employee Identity When Reasonable Cause for Concern Exists.

1. APF's HR Team Experienced First-Hand the Importance of Employing a Lawfully Authorized Workforce.

Despite multiple witnesses testifying credibly about how seriously APF takes its immigration law compliance obligations, the ALJ dismissed those concerns in a single footnote. APF cannot so blithely dismiss its obligations to comply with federal immigration law, as its recent past experience proves. Recently, APF has been subject to two Immigration and Customs Enforcement ("ICE") audits, the first of which occurred at its recently-acquired Claremont, North Carolina plant. (Tr. 625:6-14; 819:1-9). After the HR team worked for a week to provide to ICE the original I-9's and supporting documents for all 600 employees there, ICE informed APF that it had to terminate 280 of its employees – nearly half of its workforce. (Tr. 625:19-626:2; 819:22-820:6). APF's second ICE audit occurred later at its Amherst, Ohio plant, where the audit went smoothly. (Tr. 629:11-16; 822:16-23). APF also more recently passed a compliance audit at its Easley, South Carolina plant where the State of South Carolina reviewed all I-9 documentation. (Tr. 629:19-25). These audits have caused APF to be acutely attentive to the importance of immigration compliance generally, and I-9 documentation specifically. (Tr. 630:23-631:8). Ensuring that all of its employees are legally authorized to work in the United States is a top priority for the Company and its entire HR team. (Tr. 630:23-631:8). As Ramirez

[1] Contrary to Fox's testimony on direct examination, his verbal warning for GMP violations was not rescinded when Ramirez met with Fox to explain that she had accidentally provided him a copy of the outdated 2001 Policy. (Tr. 145:23-146:3; 187:8-11). No written notice of rescission was produced to support Fox's testimony.

[2] Contrary to Concepcion's testimony, Bishop did not find lotion in her clipboard. (Tr. 678:4-7). Not only would finding lotion in a clipboard be an unusual and memorable event for Bishop, as he testified, but Concepcion is not even assigned to Bishop's production lines. (Tr. 678:1-3; 8-15).

recounted in her testimony, just three weeks before the hearing in this matter, APF refused to hire of six new employees because their identification documents were deemed by APF to be invalid during new employee orientation. (Tr. 823:2-10). It is against this background that APF's actions with respect to the employee known to them as Diana Concepcion must be viewed, even though the ALJ gave short shrift to it.

2. Prior Terminations of Employees Who Could Not Confirm Their Identities With Valid Documentation.

Historically, when situations have arisen resulting in a reasonable concern that a current employee may not be who they claim to be for employment purposes, it has been APF's practice to request additional documentation from that employee to confirm the employee's identity. The past practice includes two prior situations in which reasonable concern over identity arose from employees' Facebook postings. The ALJ, in considering an identical request for additional documentation to employee Diana Concepcion, botched the application of *Wright Line* to that situation, and refused to even consider evidence of past practice – easily, the most compelling testimony and documentary evidence in the case.

In September 2012, Ramirez discovered that an existing employee that Ramirez knew from her new hire documents as Johan Rivera Roque was using a different name on the employee's personal Facebook account. (Tr. 808:1-18; R. Ex. 7:2, 3). Ramirez had encountered a Facebook page with a photograph of the individual who she knew as Rivera Roque, but who was using a completely different name on Facebook. (Tr. 808:13-19). Due to this concern as to Rivera Roque's identity, Ramirez requested that she bring in additional documentation to confirm that she was in fact Rivera Roque, as she had represented in her new hire documents. (Tr. 808:22-809:3). Ramirez gave Rivera Roque eight business days to clear up the identity question. (Tr. 808:22-809:3). When

Rivera Roque returned with an invalidated Puerto Rican birth certificate (R. Ex. 7:4),[3] Ramirez advised her that APF could not accept the invalidated birth certificate and explained why, and gave her an additional eight business days to bring in valid documents. (Tr. 801:18-19; 811:7-11). Rivera Roque did not submit any additional documentation, and Ramirez terminated her for falsification. (Tr. 813:14-16; 815:1-6; R. Ex. 7-1).

Even before the Rivera Roque situation was resolved, reasonable concern over another employee's identity came to light through Facebook. (Tr. 811:22-812:3). Similarly, Ramirez learned that an employee she knew as Edison Cresbo was using a different name on Facebook. (Tr. 811:22-812:3). Ramirez approached Cresbo the exact same way she did Rivera Roque, and similarly gave him eight business days to provide documentation to support his identity. (Tr. 812:4-6). Cresbo, too, returned with an invalid Puerto Rican birth certificate, and Ramirez afforded him the same second chance as she had Rivera Roque, giving him eight additional days to provide valid documentation. (Tr. 812:9-13; 813:4-12). Cresbo also did not meet the deadline, and Ramirez terminated him as well for falsification. (Tr. 813:14-16; 816:17-817:1; R. Ex. 7-5). Months later, Cresbo returned with a valid Puerto Rican birth certificate, and Ramirez rehired him. (Tr. 818:4-20).

3. APF Treats Concepcion Just as It did Rivera Roque and Crespo.

On June 16, 2015, Ramirez was informed by Production Supervisor, Don Lewis, that there had been a question and answer session the previous day on a local Spanish-language radio station, LaMega, discussing APF and the need for a union. (Tr. 781:5-11; R. Ex. 4). Lewis reported that Sonia Guzman and "another lady named Diana" were interviewed. Ramirez testified that at the time of the email from Lewis, she did not associate this reference to "Diana" to any specific

[3] Ramirez testified that she knew at the time that Puerto Rico had enacted a law in 2009 that declared all Puerto Rican birth certificates issued prior to July 1, 2010 invalid due to concerns of identity theft. (Tr. 809:17-22).

individual (employee or otherwise), as there were multiple employees with the first name of Diana employed by APF at the plant. (Tr. 784:20-785:5; R. Ex. 4). Curious about the content of the spot on this public radio broadcast, Ramirez went to LaMega's website to determine if a recording of the broadcast was available for listening. (Tr. 785:6-14). When she did not find a recording, she then checked the radio station's public Facebook page. (Tr. 785:14-22). The Facebook page did not archive recordings, but did contain a post advertising "workers from Pierre Foods talking about their campaign." (Tr. 785:22-786:4; R. Ex. 5). Ramirez noticed that only one individual had "liked" the post – an individual named "Yazzmin Trujillo."[4] (Tr. 788:3-12). Though Ramirez knew the names of all of APF's Cincinnati employees (because she hired and/or oriented almost all of them), she did not recognize the name Yazzmin Trujillo. (Tr. 789:7-19). There was no photo on the Facebook "like" by Trujillo. (Tr. 789:20-24).

Puzzled why a non-APF employee would be interested in the spot about APF, Ramirez clicked on "Yazzmin Trujillo" and was directed to Trujillo's Facebook page, which was open to the public. (Tr. 790:2-19; 793:1-13). The first photo on Trujillo's page was of a child's drawing. (Tr. 791:7-11; R. Ex. 5A). Ramirez then clicked on Trujillo's public "Photos" tab on her Facebook page. (Tr. 793:5-7). Ramirez saw a photograph of someone she immediately recognized as Diana Concepcion, an APF employee, depicted as Yazzmin Trujillo. (Tr. 793:23-794:1; 795:16-20; R. Ex. 5B). Ramirez wondered why Concepcion's likeness was on the Facebook page using the name Yazzmin Trujillo. (Tr. 795:11-15). Reading through the public comments on Trujillo's Facebook page, Ramirez noticed that several other individuals who had posted shared the last name of "Trujillo." (Tr. 796:5-8). Yazzmin Trujillo had referred to three of these individuals as relatives in

[4] The General Counsel's witnesses admit that Concepcion in fact participated in the June radio show, along with Sonia Guzman. (Tr. 80:2-8; 84:12-21).

her public posts. (Tr. 796:5-8). Twice, Trujillo referred to Alberto Trujillo[5] as "papi," or "dad"; once on August 27, 2013 (Tr. 797:16-21; R. Ex. 5C) and once on May 22, 2015. (Tr. 798:20-25; R. Ex. 5D). Yazzmin Trujillo referred to Erick Emmanuel Trujillo as "hermanito" or "brother" on April 25, 2015 (Tr. 799:10-14; R. Ex. 5E), and Adriana Trujillo as "Tia," or "aunt" on July 11, 2013. (Tr. 799:16-25; R. Ex. 5F). Ramirez noticed that while a large population of Trujillo's Facebook friends shared the last name "Trujillo," not a single friend had the last name Concepcion. (Tr. 801:14-19; R. Ex. 5G). Ramirez did not review any other Facebook pages in conjunction with her discovery. (Tr. 803:4-11).

Trying to piece together a logical answer as to the true identity of the employee she knew as Diana Concepcion, Ramirez reviewed Concepcion's HR beneficiary information completed upon hire. (Tr. 804:17-21). Ramirez discovered that Concepcion was unmarried, but that she listed as a beneficiary a woman with the last name "Trujillo" who lived at the same address as Concepcion. (Tr. 806:5-18; R. Ex. 6). Ramirez testified that based upon what she had learned by this time, she believed that there was a strong possibility that the individual she knew as Diana Concepcion might not be who she represented herself to be to APF in her federal immigration new hire documents. (Tr. 807:3-8). Connecting the dots in her head – the "another lady named Diana" was most likely Concepcion, who she knew to be a Union supporter.[6] (Tr. 824:18-20; R. Ex. 8). Ramirez shared with Chuck Aardema, Senior Vice President of Human Resources, the information she learned on Facebook and the questions she had regarding Concepcion's identity, noting that Concepcion was a Union supporter. (Tr. 823:14-20-824; R. Ex. 8). In response, Aardema asked whether the Company had any history with this type of situation in which the Company had concerns about an

[5] Alberto Trujillo's Facebook profile picture is that of the Mexican flag. (Tr. 801:20-24; R. Ex. 5G).

[6] The ALJ assails Ramirez on this point, but he is confused. She knew Concepcion was a Union supporter before June 16. What she did not know until she saw Concepcion's photo listed as Yazzmin Trujillo was that the "another lady named Diana" was Concepcion.

employee's identity. (Tr. 825:12-18; R. Ex. 8). He then gave explicit directions to Ramirez given Concepcion's status as a Union supporter: "[w]hile she may be a supporter of the union campaign, we need to be sure we're approaching this regardless of her views in that regard and in the same manner as we would otherwise." (Tr. 825:15-18; R. Ex. 8). Answering Aardema's question regarding APF's past practice when a reasonable concern existed, Ramirez immediately referenced the Rivera Roque and Cresbo situations and informed Aardema of the existing practice - she has called employees into HR, expressed concern, and given them time to bring in additional documentation to confirm their identity. (Tr. 826:1-12; R. Ex. 8).

Aardema then instructed Ramirez that she should follow Company practice in dealing with Concepcion. Ramirez did exactly that. (Tr. 828:15-20). Ramirez and Ernie Hayes, Employee Relations Manager, met with Concepcion and explained that in looking for a radio station newscast, she discovered Trujillo's Facebook page and the photo of Concepcion under the name Yazzmin Trujillo. (Tr. 831:25-832:8). Ramirez conveyed APF's concerns regarding her identity. (Tr.: 832:14-18). Concepcion immediately denied having any Facebook page, and the meeting ended. (Tr. 832:8-10). Within minutes, Ramirez could no longer access Trujillo's Facebook page.[7]

Ramirez and Hayes subsequently met with Concepcion again that day, informing Concepcion verbally and giving her a letter requesting additional documentation to confirm who she was, including a listing of acceptable documents to aid her in her effort. (Tr. 833:14-22; G.C. Exs. 21, 22). Ramirez allowed Concepcion to continue working, and gave her 8 business days (or until June 29) to provide the requested documentation.[8] (Tr. 834:10-22). Later that day, Concepcion,

[7] The page could have been deleted, the privacy settings changed, or the settings changed to block certain people from viewing the page. (Tr. 835:24-836:3).

[8] After APF requested additional documentation from Concepcion, several mangers received an anonymous letter in the mail at work that 4 individuals, one of whom was Concepcion (and three of whom were known union supporters), were not authorized to work legally in the United States. (Tr. 839:19-840:21; 842:3-11;845:18-24; R. Ex. 10). The anonymous letter indicated that one of the individuals listed was Mexican, but using a Puerto Rican name. (R. Ex. 10). In response to the letter, Ramirez reviewed

along with co-workers Vianey Guzman and Cotto, approached Ramirez, and volunteered that many people have Facebook pages with different names. (Tr. 836:12-838:8). This comment struck Ramirez as odd, since Concepcion previously stated that she did not have a Facebook page. (Tr. 838:9-16).

On June 29, Concepcion provided APF with a copy of a Puerto Rican birth certificate dated December 17, 2003. (Tr. 848:8-14; R. Ex. 11). Ramirez knew from her previous experiences that the document provided by Concepcion was facially invalid. (Tr. 852:24-853:5). Ramirez informed Concepcion that APF could not lawfully rely upon the birth certificate she had provided as valid documentation to confirm her identity. (Tr. 852:24-853:5). After again consulting Aardema, Ramirez telephoned Concepcion and advised her that although APF could not accept the Puerto Rican birth certificate she provided because it was legally invalid, APF would allow her twelve additional business days (or until July 17) to acquire a valid Puerto Rican birth certificate, and that APF would pay for expedited shipping of the valid birth certificate. (Tr. 855:11-19). Further, Ramirez made several other offers to Concepcion she had not made to the two others. She offered that if Concepcion needed time off work in order to obtain the documentation, she could take that time off as paid leave. (Tr. 855:20-23). Concepcion told Ramirez that she intended to pursue a valid birth certificate from Puerto Rico, but that she would rely on help from the Union to obtain it, and that she would return to work the next day. (Tr. 856:1-4). In a letter mailed to Concepcion, APF memorialized the information Ramirez shared with Concepcion, and helpfully included a website address from which she could obtain a new Puerto Rican birth certificate in just eight to twelve days. (Tr. 857:18-858:16; R. Ex. 12).

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the personnel files of the three other individuals listed. She did not see anything unusual and did not request additional information from them as a result. (Tr. 846:5-13).

Concepcion worked during the interim 12-day period. (Tr. 858:17-20). She did not accept APF's offer to pay for expedited shipping of a valid birth certificate. (Tr. 858:21-24). To address misguided objections lodged with APF on her behalf by the Union's lawyer,[9] APF explained once again to Concepcion that her December 17, 2003 Puerto Rican birth certificate was not a valid document for purposes of confirming her identity, that it was not "re-E-verifying" her, and that she needed to provide APF with some form of valid documentation in order to remain employed. (Tr. 859:24-860:2). Concepcion provided nothing else by July 17. (Tr. 864:13-15). Instead, on that date, she called off work "on strike,"[10] and a letter signed by Concepcion was delivered to Ramirez. (Tr. 860:14-861:2; R. Ex. 14). The letter offered the same misguided "re-E-verify" objection and requested an additional 90 days to comply with the request. (Tr. 861:7-12; R. Ex. 14). Because Concepcion had not demonstrated any attempt whatsoever to acquire the requested documents, and because she had now been given more than the two others, APF did not grant her request for additional time. (Tr. 862:1-9). When Concepcion confirmed that she did not have documentation to confirm her identity, APF suspended her indefinitely. (Tr. 864:13-20; R. Ex. 15).

The ALJ devotes pages of his opinion to recounting these facts, including acknowledging APF's evidence on its past practices, as well as Aardema's instruction to treat Concepcion just as they had the other employees. But his legal analysis completely ignores these critical pieces of evidence.

[9] *See* R. Ex. 13. As communicated in R. Ex. 12, APF's request for additional documentation was not an attempt to "re-verify" Concepcion. APF is well-aware that an employer cannot lawfully send a current employee through the E-Verify system, and did not re-E-verify Concepcion.

[10] APF did not assess her an attendance point for this unexcused absence. (Tr. 432:13-16).

F. Jessenia Maldonado is Issued a Single Attendance Point for her Unexcused July 17 Absence.

Under APF's Attendance Policy (R. Ex. 34), a full-day absence that is not pre-approved results in the issuance of an attendance point. (Tr. 1083:19-1084:22). When absences are not previously approved, employees are required to leave a voicemail with the Company by calling APF's official "call-in number" that is designated for only that purpose. (Tr. 1086:14-23). The call-in number is the only way that employees are permitted to notify the Company of an absence that is not pre-approved. (Tr. 1086:14-23). APF Manufacturing Coordinators listen to the voicemail messages and record absences on a daily call-off sheet. (Tr. 1087:12-14). The daily call-off sheet indicates the name of the absent employee, their shift, the time they called off, and whether the employee is requesting to use PTO or vacation time for the absence. (Tr. 1087:22-1088:1). After processed, the voicemails are deleted due to the large number of voicemail space taken. (Tr. 1089:6-1090:3).

In mid-July 2015, Ramirez found a self-titled "call-off/strike script" left behind in the ladies' locker room at the plant. (Tr. 1090:10-1092:11; R. Ex. 35). The call-off/strike script indicated that employees who intended to strike should inform APF in their voicemail: "I am not reporting to work today to protest the Company's unfair labor practices. I will unconditionally return to work on my next scheduled shift." *Id.* As a result, she anticipated that at least some employees might call-off on July 17 using the scripted language or otherwise referencing a Union strike or protest. (Tr. 1092:25). Ramirez was aware that under the Act, employees who engaged in this type of concerted activity should not be given attendance points. (Tr. 1093:7-12). To ensure compliance with the Act, Ramirez instructed the Manufacturing Coordinators to mark the call-off sheet by putting a "star" or asterisk next to the name of any employee who used the call-off/strike script or referenced

the Union protest in their call-off voicemail message, to ensure those employees did not receive an attendance point. (Tr. 1093:13-22).

On July 17, 9 out of approximately 600 employees called-off work using the Union call-off/strike script. (Tr. 1104:2-7). The employees who used the script to call-off stating that they were "protesting" on the 17th were not issued an attendance point. (Tr. 1104:8-21). Approximately 15 other employees also called-off on July 17 and did not use the call-off/strike script. (Tr. 1103:19-1104:1). Jessenia Maldonado was one of those 15 individuals. (Tr. 1105:2-1106:1).

Maldonado works as a second-shift packer and was scheduled to work on July 17, 2015. (Tr. 1105:14-15). She claimed to have called in three separate times on July 17, a claim that the ALJ considered and rejected as not having "the ring of truth." (ALJD 41: fn. 47). The July 17 daily call-off sheet indicates that Maldonado left a voicemail only one time on July 17 -- at 3:36 p.m. -- and did not use the call-off/strike script verbiage, given that no asterisk was placed by her name. (Tr. 1105:19-21). Because she did not reference any concerted activity in her voicemail message, Maldonado was charged an occurrence point for her July 17 absence, like the 14 other individuals who called in without such a reference. (Tr. 1105:24-1106:1). Ramirez testified she never spoke in person with Maldonado regarding her July 17 attendance point. (Tr. 1106:15-1107:2).

G. Implementation of CATS.

Not long after APF's new Plant Manager, Petra Sterwerf, arrived at the Cincinnati plant in September 2014, it quickly became apparent to her that a LEAN manufacturing communication and follow-up tool that she had used at her prior unionized employer – Communicating Answers Tracking System ("CATS") – would be helpful at APF. (Tr. 714:14-716:2; 715:9-11; 722:5-6). By early spring 2015, she had witnessed the negative impact poor communication had on the production floor. (Tr. 716:3-20). In addition, Sterwerf concluded that employees were not getting

answers to some basic questions about the business and its operations.[11] (Tr. 719:12-14). Based on these concerns, Sterwerf concluded that CATS would be a helpful tool. (Tr. 716:3-20; 720:5-22). Sterwerf's conclusion to bring CATS to APF pre-dated the start of the Union campaign. (Tr. 717:2-6).

To facilitate the introduction of CATS, Sterwerf initially spoke with Dwayne Stanford, her Operations Manager, about the best way to implement LEAN manufacturing concepts and tools, including CATS, at the plant. (Tr. 717:19-718:15). Stanford also addressed the CATS program with Ramirez in March, 2015, and advised her of the benefits he saw in the communication tool at his prior employer. Ramirez took notes of this meeting. (ALJD 52:40-42; Tr. 698:3-12; 870:2-13; 871:11-17; R. Ex. 17). The CATS program was first announced to employees during Sterwerf's business review meeting in May 2015. (Tr. 723:17-22; 724:25-725:1). Sterwerf and the HR team then worked to tailor the CATS form obtained from her prior employer to APF, and finalize it for roll-out in July. (Tr. 557:3-11; 583:4-7; 586:20-22; 728:3-729:5). Though CATS was actually implemented after the Union had begun to flyer at the Cincinnati plant, Sterwerf's decision to announce the CATS program was not influenced in any way by the Union campaign. (Tr. 727:16-728:2). Plans to roll it out pre-dated the Union drive by months.

The first CATS form was submitted by Ronnie Fox on July 21, 2015. (G.C. Ex. 15). In his form, Fox complained about the attendance points policy and suggested a change. (G.C. Ex. 15). Ramirez spoke with Fox in response to his CATS submission form and informed him that the Company had been, for some time, reviewing the attendance points system Company-wide. (Tr. 155:19-156:18). APF did not make (and has not made) any change to its attendance policy in response to Fox's CATS submission. (Tr. 732:13-17). A few days later, a packet of 20-30 forms

[11] APF's prior communication strategy included a suggestion box. When she looked in the box that first time, Sterwerf discovered 8 year old suggestion. (Tr. 720:13-19).

was submitted directly to Ramirez by Charles Rogers. (Tr. 733:13-21; 734:10-21; R. Ex. 20). Someone had stripped the form of APF logos, and replaced it with Union logos. These bastardized forms all were xeroxed copies of the same complaint, requesting a $15/hour minimum wage. (Tr. 734:17-735:4). Sterwerf decided not to respond to the bastardized forms since they were not on an actual CATS form. (Tr. 725:12-20). No discipline was issued to any of the employees who altered the CATS form and submitted them. (Tr. 735:21-24).

V. ARGUMENT

A. Standard of Review and Credibility

In reviewing Exceptions to an ALJ's decision, the Board is to evaluate whether findings of fact are contrary to the preponderance of the evidence. 29 C.F.R. §102.48(c). The Act "commits to the Board itself, not to the Board's ALJs, the power and responsibility of determining the facts as revealed by the preponderance of the evidence." *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 544-545 (1950). Accordingly, the Board conducts a *de novo* review of the entire record, and is not bound by the ALJ's findings. While the Board attaches weight to an ALJ's credibility determinations that are based on demeanor, *see id.* at 545, "the Board has consistently held that where credibility resolutions are not based primarily upon demeanor the Board itself may proceed to an independent evaluation of credibility." *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB No. 57, 191 LRRM 1328, 1331-32 (2011) (internal quotations omitted). "Further, even demeanor based credibility findings are not dispositive when the testimony is inconsistent with the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Id.* at 1332.

Because the ALJ did not make credibility determinations based on demeanor, the Board should make independent credibility determinations with respect to each witness.

B. Whether the ALJ Properly Determined that APF Violated Section 8(a)(1) of the Act by Watching Videotape of Activity in the Cafeteria and in Particular the Activity of Carmen Cotto. APF's Exceptions to the ALJ Decision (the "Exceptions") 4, 5, 63, 64.

In response to complaints from other employees, Ramirez reviewed the archived video tape footage to investigate the incident that generated these complaints. Ramirez testified that her practice is not to watch live camera footage; instead, she only reviews historical camera footage in response to employee complaints or to assist in investigations. (Tr. 544:4-10). And that is exactly what she did here. She reviewed the archived video from the date of the complaints. Ramirez was not watching the live video on June 8 and just happened to witness Cotto. Pulling and viewing archived videotape to investigate an incident raised by an employee is not surveillance. *Wackenhut Corp.*, 348 NLRB 1290, 1299 (2006).

The ALJ also found APF to be in violation of the Act for its ongoing videotaping of the employees' breakroom. (ALJD 15:15-16). APF has video cameras in a number of locations throughout its plant, including the parking lot, the meat grinding area, and the freezer warehouse. (Tr. 545:1-13). These cameras were in place for many years before the Union drive came into being back to 2010 or 2011. Accordingly, APF's videotaping of the lunchroom for years cannot be illegal surveillance just because on June 8, Guzman happened to be engaged in protected activity there. *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1841 (2011). "The Board also finds it 'neither unlawful nor objectionable when a . . . security camera, operating in its customary matter, happens to record protected concerted activity on videotape.'" (internal citations omitted). *See also Arden Post Acute Rehab,* 2016 NLRB LEXIS 395, *39 n. 38 (May 27, 2016) ("Employers are under no legal obligation to avert their eyes from such open activity."). Ramirez's actions to investigate an employee complaint were not an effort to surveil employee activities, and were not directed at discovering Cotto's Union activities or involvement. Instead,

as part of her duties as HR Manager, Ramirez was following up on complaints from employees, like she would in any other situation. The ALJ's decision that APF surveilled Cotto is unwarranted in law.

C. Whether the ALJ Properly Determined that APF Unlawfully Interrogated Cotto in Violation of Section 8(a)(1) of the Act. Exceptions 3, 4, 5, 6, 7, 8, 13, 14, 63, 64.

Not every interrogation is unlawful under the Act. The Board has identified the so-called *Bourne* factors to shed light on when questioning of an employee becomes coercive, and therefore, violative of the Act. *Westwood Health Care Center*, 330 NLRB 935, 939. The ALJ erred by not applying those factors here.

Had he done so, he would have found factor one (background) to militate against coercion. On June 8, there was no history of hostility toward Cotto as a result of her Union activities, and certainly no discrimination. As to factor two (nature of the information sought), neither Cotto nor Guzman contend that Ramirez or Chernock mentioned the Union or asked either whether they were engaged in activity on behalf of the Union. (Tr. 234:12-15; 610: 2-5; 763:4-6). Instead, it was Cotto who volunteered that the Union had told her that the distribution was permissible. No evidence was presented that Ramirez or Chernock explicitly or implicitly inquired, or sought information about anything during their meeting with Cotto. This was a meeting without questions. As to factor three (identity of the questioner), the ALJ wrongly described Chernock and Ramirez as two top HR officials. (ALJD 18:14). They were not; Ramirez had only recently been promoted to Human Resources Manager, and Chernock was her boss. The place and nature of questioning (factor four) was so uncoercive that Cotto actually hugged Chernock at the end of their first short meeting. This belies any contention of hostilities or coercion. The fifth factor (truthfulness) is not pertinent. The ALJ's failure to apply the

Bourne factors to the meeting was in error, and had he done so, he would have found no violation of Section 8(a)(1).

D. Whether the ALJ properly determined that APF violated Sections 8(a)(1) and (3) of the Act by disciplining Cotto and Guzman. Exceptions 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 63, 64.

The ALJ's decision that APF disciplined Cotto and Guzman and that the discipline violated Sections 8(a)(1) and (3) was in error, because APF did not discipline Guzman, and as to Cotto because its enforcement motives were pure. The ALJ erred by failure to accept that APF's "true motive" in disciplining Cotto was her violation of the superseded solicitation policy. Union animus was lacking under the *Wright Line* analysis, because Ramirez and Chernock were operating under the outdated policy. Their mistaken belief that that outdated policy defined the appropriateness of Cotto's behavior was what motivated them, not a desire to squelch a Union drive.

Also, the ALJ's failure to accept APF's repudiation efforts on the Cotto discipline was in error. When the Company realized on June 9 that it had been referencing a copy of an outdated policy, Ramirez and Chernock swung into action. They met with Cotto that same day to apologize for APF's error and to rescind the verbal warning. Ramirez and Chernock actually gave Cotto a written rescission notice to ensure that she understood that her warning had been unquestionably rescinded. (Tr. 621:5-13; 776:3-6; 777:10-13; R. Ex. 3). And even though the ALJ found otherwise, Ramirez specifically told Cotto she could distribute in the cafeteria. (ALJD 17:25-34; Tr. 619:2-13; 777:3-8).

The ALJ also found that Guzman was issued a verbal warning by Ramirez and Chernock. (ALJD 12:19-20). Other than Guzman's unsupported testimony that she was disciplined, zero evidence corroborates the ALJ's finding. Ramirez and Chernock both denied issuing any discipline in any conversation with Guzman. (Tr. 622:7-10). Had Guzman been disciplined,

Ramirez and Chernock would have taken the same exact steps as they did with Cotto. Moreover, the ALJ's statement that "Clearly, Guzman was suspected of passing out union literature" is flatly wrong. Ramirez had seen the video archive, and knew that Guzman had distributed nothing.

Guzman testified under oath that her discipline was rescinded by the Company. Not only is there no evidence of discipline, but there is, correspondingly, no evidence of rescission as to her. Ramirez and Chernock both deny meeting with Guzman on June 9 to rescind any discipline, and both deny creating a written notice of rescission for her (while admitting they did for Cotto). Not a single person testified to seeing this alleged notice of rescission except for Guzman, who for some reason, did not think it necessary to give a copy of the alleged notice to the Union or the General Counsel. Instead, she claimed she "threw away" the alleged notice four months after the charge had been filed when she resigned. (Tr. 348:8-12). There is literally not a shred of evidence to support the ALJ's determination, other than Guzman's own dubious testimony.

E. Whether the ALJ Properly Determined that APF's Clipboard Audit Constituted Unlawful Surveillance in Violation of Section 8(a)(1) of the Act. Exceptions 18, 19, 20, 21, 22, 23, 63, 64.

The ALJ ruled that APF surveilled employees' union activities and coerced employees by searching clipboards and confiscating union cards found in Ronnie Fox's clipboard during a GMP audit. If affirmed, the ALJ's decision would prevent food manufacturers subject to strict food quality standards from monitoring work areas after receiving information that employees were knowingly disregarding food safety rules. Cross-contamination with food product can occur when any foreign object is introduced to the production materials, which is the legitimate business reason for the GMP's. Though the ALJ somehow found that APF's GMP Rule 6.5 was a presumptively invalid "content-neutral ban on personal items," because it could be reasonably understood to cover

union materials (ALJD 22: n. 30), the right to engage in union activity on the floor of the plant cannot and does not supersede APF's food safety obligations.

When APF became aware that employees were possibly keeping union cards on the production floor in violation of the GMP's, it took the same action it would have in any comparable situation to ensure that its quality standards were being followed -- it instituted a GMP audit. Audits have been in place for years, occurring both at designated times and randomly. There was no specific intention or effort to target Union supporters. Floor supervisors checked all employee clipboards for improper materials, not just known Union supporters. The search was the result of APF's enforcement of a neutral food safety rule, and would have been carried out if the supervisors were made aware that a number of employees had other foreign objects in their clipboards. Said differently, it was not the content of the contraband that motivated the clipboard search. This is proven by the fact that the supervisors did not march out to Fox and other known Union supports; instead, they conducted a broad quality audit. The ALJ's ruling that the search was an unlawful surveillance in violation of Section 8(a)(1) is in error.

F. Whether the ALJ Properly Determined that APF's Issuance of Discipline to Ronnie Fox Violated Section 8(a)(3) of the Act. Exceptions 18, 19, 20, 21, 22, 23, 24, 25, 63, 64.

Because Fox was storing personal property in a clipboard in violation of the GMP's, he was issued a verbal warning. His discipline was never rescinded like Cotto's discipline for solicitations, because his GMP discipline was unrelated to the outdated solicitation policy. He testified that although he was unsure at the time whether his keeping the authorization cards in his clipboard violated the GMP's, he now understood that he violated the GMP's. (Tr. 168:20-25). The ramification of the ALJ's decision on Fox's discipline is that employees would be privileged to violate food safety standards under Section 7 just because the items they possess are union cards. This cannot be the result, particularly here, where the employee admittedly violated a well-

established food safety policy that prevents all personal property from being brought on the production floor. Because APF enforced its GMP's as to union cards the same way it would have to any other prohibited item, the ALJ's decision should not stand.

G. Whether the ALJ Properly Found that APF's Search for the LaMega Broadcast and Review of Yazzmin Trujillo's Facebook Page Constituted Unlawful Surveillance in Violation of Section 8(a)(1) of the Act. Exceptions 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 48, 49, 52, 53, 54, 63, 64.

In a decision that stretches the protections afforded by the Act beyond all reasonable bounds, the ALJ concluded that: (1) merely *attempting* to review publically broadcast union propaganda constitutes unlawful surveillance; and (2) the review of a non-employee's public Facebook page to understand the identity of the non-employee constitutes unlawful surveillance. Not only are the ALJ's conclusions unsupported by the record evidence and Board precedent, his conclusions and proposed remedy have policy implications that place APF in a very untenable position.

i. APF Did Not Unlawfully Surveil its Employees When Ramirez Attempted to Listen to the Public Commentary Broadcast.

Board and federal case law have long held that an employer may observe employees engaging in Section 7 activities when they engage in such behavior in an open and public manner. *Stahl Specialty Co*., 2016 NLRB LEXIS 297 (2016). Such employer observation is permissible if done in a manner that is not out of the ordinary and absent coercive behavior. *Id*., citing *Eddyleon Chocolate Co*., 301 NLRB 887, 888 (1991) (noting "[t]he Board has long held that management officials may observe public union activity without violating the Act so long as those officials do not do something out of the ordinary."). Evidence of coerciveness includes the "duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation." *Id.* That

employees intentionally seek publicity may be a relevant factor in determining coerciveness. *United States Steel Corp. v. NLRB*, 682 F.2d 98, 103 (3d Cir. 1982).

As noted above, Ramirez never located the recording of the LaMega public broadcast. She never listened to what the two individuals publically discussed. She saw only a Facebook ad published by the LaMega radio station on the LaMega website, referencing the broadcast. No employee was specifically mentioned in the ad, and no employee "liked" the ad or commented on it. Therefore, Ramirez never actually observed any concerted and protected activity in reviewing the LaMega website and Facebook page. *Worldmark by Wyndham*, 356 NLRB No. 104, slip op. at 2 (2011) (concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action."), quoting *Meyers Industries*, 281 NLRB 882, 887 (1986), enfd. sub nom., *Prill v. NLRB*, 835 F.2d 1481, 266 U.S. App. D.C. 385 (D.C. Cir. 1987); see also *KNTV, Inc.*, 319 NLRB 447, 450 (1995) ("Concerted activity encompasses activity which begins with only a speaker and listener, if that activity appears calculated to induce, prepare for, or otherwise relate to some kind of group action."). The ad itself is not concerted activity -- only the employees' participation in the radio broadcast was, which Ramirez never listened to or saw. Neither the General Counsel nor the Union adduced evidence to the contrary. Accordingly, there can be no surveillance by Ramirez since she neither witnessed or heard protected concerted activity.

Additionally, even if Ramirez had listened to a recording of the LaMega broadcast, her "observation" of employee conduct would not have been conducted in person, but only through the anonymity of electronic media. Ramirez's conduct was no different from passively watching a news segment on television or reading a newspaper article online that concerned unionization at APF, which is not and never has been violative of the Act. (This analogy presumes, of course,

that she actually located the television show and watched it, or actually accessed the online article and read, given that Ramirez actually never listened to the LaMega recording).

The ALJ also overlooked critical facts in attaching Section 7 rights to the broadcast she never listened to. The ALJ likened Ramirez's conduct to "the 'curious' supervisor who, upon hearing that there would be Union activity at a roadside park or local tavern, takes a ride over there to see what he or she could see," citing to *Astro Shapes, Inc.,* 317 NLRB 1132 (1995) *et al*. The fatal flaw in that line of cases is that Ramirez's "curiosity" that caused her to click on the Trujillo Facebook page was NOT about employee union activity. It was to discern who this non-employee was. The cases cited by the ALJ are premised on curiosity about who was attending a union meeting, which is simply not present here. (ALJD 31:10-38).

Moreover, the two employees who participated in the LaMega broadcast were not attempting to engage in private, concerted activity in a forum intended to be attended by their fellow employees only. To the contrary, their intent was necessarily to broadcast to the general public their desire to unionize APF. Although Section 7 of the Act affords employees the right to communicate their efforts to the public, such right does not mean that an employer is prohibited from listening to such public communications, particularly where that communication is made available to anyone with a radio or a computer. The Act does not (and cannot) require employers to don blinders and earmuffs to avoid publically-available media.

The ALJ's decision in this regard ignored clear Board precedent that employer surveillance is not unlawful when an employer merely observes employees who openly solicit for a union in "full public view." See *Chemtronics, Inc.,* 236 NLRB 178 (1978); *Hoschton Garment Co.,* 279 NLRB 565, 566 (1986); *Harry M. Stevens, Inc.,* 277 NLRB 276 (1985).[12]

[12] The ALJ's attempts to distinguish this line of cases missed the mark. (ALJD 32: n. 41). In these cases, there was no unlawful surveillance even where there was actual observation by the employer, and the employees engaged in protected activity on the

Indeed, the ALJ's determination that Ramirez surveilled in violation of the Act by merely "seeking out information on the internet about the employees' union activity", lacks any citation to Board precedent.

To the contrary -- surveillance, by itself, does not violate the Act. *NLRB v. Computed Time Corp.*, 587 F.2d 790 (5th Cir. 1979). Rather, in order for an employer to violate Section 8(a)(1) by illegal surveillance, it must "interfere with, restrain, [or] coerce" employees in the exercise of their Section 7 rights. *Id.* To find coercion here, the ALJ relied upon the fact that Ramirez disclosed to Concepcion that she had searched for the LaMega broadcast. But Ramirez did not find the radio broadcast. She observed no concerted activity. She saw that an ad for the broadcast had been "liked" by one non-employee. Ramirez only informed Concepcion of her search for the radio broadcast to provide Concepcion with context of how she discovered that Concepcion was using another identity. Moreover, Concepcion had to expect that APF would listen to her radio spot, since the whole point of being on public airwaves was to publicize their unionization efforts. Ramirez's disclosure to Concepcion cannot serve as valid evidence of coercion, given the context. If adopted, the ALJ's decision would forbid managers/supervisors from viewing union television interviews, or reading articles published by a union in the newspaper or on the Internet. The Act does not require employers to ignore information intentionally broadcast by a union for the general public to consume. Because Ramirez was lawfully entitled to listen to the LaMega broadcast -- had she been able to locate a recording -- there was no unlawful surveillance in her attempt to hear what the employees were discussing on public airways.

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employer's own premises. Here, there was no actual observation of the employee conduct, which did not occur on the employer's property, but that had been broadcast to the entire listening public through the media. There can hardly be a more apt example of employee activity being in the "full public view" than a publicly broadcasted radio program and a website/Facebook page containing the program.

ii. The ALJ Incorrectly Extended the Act to Prohibit Alleged Surveillance of a Non-Employee.

The ALJ's conclusion that Ramirez's review of the Facebook page of Yazzmin Trujillo constituted unlawful surveillance (ALJD 32) is fatally flawed for a second, independent reason. When Ramirez clicked on the Facebook page of Trujillo (an unknown person to her), her motivation could not have possibly been to surveil an *employee* or to investigate an *employee's* union activities. Indeed, no Yazzmin Trujillo is employed, or has ever been employed, by APF. As a result, the ALJ's decision improperly extends the Act's protections to non-employees.

Section 8(a)(1) of the Act is clear: it is an unfair labor practice for an employer to interfere with, restrain, or coerce **employees** in the exercise of the rights guaranteed in Section 7. "By its plain terms … the NLRA confers rights only on employees, not on unions or their nonemployee organizers." *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992). The facts concerning what Ramirez did on the morning of June 16 are not in dispute, as Ramirez was the only one who testified concerning them. When she saw that a single individual -- Yazzmin Trujillo -- had "liked" the post, Ramirez did not recognize Trujillo's name and did not believe she was an employee. (Tr. 789:7-19). She testified that she was curious why a non-employee would "like" or even be interested in this particular content, given that it was focused on APF. (Tr. 790:2-19, 793:1-13). The General Counsel produced no witness who provided any testimony to contradict Ramirez's stated motivation. Ramirez clicked on the link to Trujillo's Facebook page to see if she could discern who Trujillo was, and it is that act -- clicking on a non-employee's Facebook link to determine why an uninvolved third party would be interested in unionization at APF -- that the ALJ determined was unlawful surveillance. That determination cannot be correct.

With the back of his hand, the ALJ dismisses as "sophistry" APF's argument that her single click on Yazzmin Trujillo's link was not surveillance. At that precise point in time, when she clicked on the link, it is critical to understand what Ramirez knew and did not know is critical. She knew there was no Cincinnati plant employee named Yazzmin Trujillo. She knew two individuals, employee Sonja Guzman and "a lady named Diana," may have participated in a radio broadcast concerning APF. She did not know or suspect at that point that Concepcion was involved, given the number of Diana's at the plant, and given that Lewis' email did not reference or infer that "a lady named Diana" was an employee. Similarly, she did not know or suspect at that time that Concepcion was Trujillo. There is no evidence, or even implication, that Ramirez knew or even thought at that moment that Trujillo was an employee of APF. Ramirez's review of a public page on a social media website -- a page she credibly testified she believed belonged to a non-employee not connected to APF -- was not unlawful. The irony here is that it was this lack of connection to APF that actually motivated Ramirez's click, as she wanted to see why a non-employee "liked" the broadcast. This same lack of connection and non-employee status necessarily means Ramirez was not surveilling in violation of the Act. This situation is no different than if Ramirez had simply "Googled" the names of non-employee union organizers to find more information about their work location, or titles, or other union campaigns.

That the ALJ missed this distinction entirely is borne out by his own words. At page 32 of his decision, after the ALJ accuses APF of "sophistry," he writes in the very next sentence:

> Ramirez knew Trujillo supported the Union and its efforts at AP –
> that is precisely why she investigated Trujillo.

(ALJD 32). This is blatantly wrong. Ramirez had no idea who Trujillo was. She did not recognize the name as an employee, and therefore, it was impossible for her to have known whether Trujillo supported the Union and its efforts. This incorrect and wholly unsupported

factual finding is contrary to the preponderance of evidence. But most importantly, this faulty finding is the factual underpinning for the ALJ's legal conclusion that APF surveilled Concepcion illegally, and for the ALJ's legal conclusion that APF's request of Concepcion for documentation violated the Act. Because his factual underpinning is fatally flawed, the two legal conclusions that flow from that factual determination are necessarily flawed as well. The ALJ was correct in recognizing sophistry, but the fallacy is in his own conclusions concerning Ramirez's click on the Trujillo icon.

That Ramirez later, based on what she learned from the link, surfaced serious questions as to whether Concepcion and Trujillo are the same person does not taint her initial lawful click. The ALJ's decision glosses over this important distinction, thereby polluting his view of Ramirez's activity with her subsequent discovery that she was likely reviewing information about an employee (Diana Concepcion). This was not the case of a supervisor who was lawfully surveilling individuals at a union meeting until the supervisor "spies someone she knows," as contended by the ALJ. (ALJD 32). To the contrary, Ramirez -- the HR Manager familiar with all of the Cincinnati plant employees -- *knew* that Trujillo did not work for the Company. What Ramirez did not know at the time she clicked but eventually discovered, was that Yazzmin Trujillo was likely passing herself off to APF and the federal government as employee Diana Concepcion. But Ramirez's subsequent deduction does not taint her initial click. The ALJ missed that critical distinction, and his doing so resulted in two erroneous legal conclusions.

H. Whether the ALJ's Determination that APF's Request for Documentation to Establish the Identity of an Individual and Ultimate Suspension of that Individual for Failing to Produce the Requested Documentation was Unlawful Retaliation in Violation of Sections 8(a)(1) and (3) of the Act. Exceptions 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 63, 64.

To accept the ALJ's first conclusion that Ramirez violated the Act by surveilling the Company's employees, the Board would be forced to assume that Ramirez knew from the start

of her Facebook click that Yazzmin Trujillo was in fact Diana Concepcion. As stated above, not a shred of testimony or documentary evidence supports such a conclusion. To the contrary, all record evidence and testimony supports the conclusion that only after reviewing publically-posted photos and conversations with family members (none of which involved protected concerted activity), Ramirez discovered that Trujillo was very likely Concepcion. Once Ramirez became aware of this discrepancy in Concepcion's identity, APF was compelled by federal law to confirm Concepcion's ability to work in the United States. The ALJ's conclusion that the demand for documentation to confirm Concepcion's identity was unlawful not only ignores APF's legal obligations and how APF had handled similar situations in the past, but puts the Company in the perilous position of possessing information which could very well make its continued employment of Concepcion illegal, but not being able to act on such information.

i. APF Was Obligated Under Federal Law to Confirm Concepcion's Identity.

In a single and sweeping footnote which he adds "for the sake of completeness," the ALJ presumptively dismisses APF's federal obligation to employ only legally authorized workers, blithely describing APF's obligation to confirm Concepcion's identity as "unsupported." (ALJD 38: n.45). The ALJ's conclusion fails to appreciate an employer's responsibilities under the Immigration and Reform and Control Act of 1986 ("IRCA"), and the potential consequences to APF for continuing to employ an individual who has failed, despite multiple opportunities, to provide documentation to prove her identity.

Under federal immigration law, it is unlawful for an employer to knowingly hire an alien who is unauthorized to work in the United States. 8 U.S.C. § 1324a(a)(1). IRCA establishes an employment verification system under which an employer must execute a verification form ("I-9") attesting, under penalty of perjury, that it has verified that each employee is not an

unauthorized alien by examining the requisite documents showing identity and employment authorization. 8 U.S.C. § 1324a(b). However, it is also unlawful for an employer to *continue to* employ an alien with the knowledge that his/her employment is unauthorized. 8 U.S.C. § 1324a(a)(2).

Federal law does not require that knowledge of unauthorized status comes to the employer in any specific way. *Mester Manufacturing Co. v. INS*, 879 F.2d 561, 563-66 (9th Cir. 1989). Constructive knowledge alone is sufficient, including knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. *Id.*, 8 CFR 274a.1(l)(1). Thus, while initial verification at the hiring stage is done through document inspection, "[n]otice that these documents are incorrect places the employer in the position it would have been if the alien had failed to produce the documents in the first place: it has failed to ensure that the alien is authorized." *New El Rey Sausage Co. v. INS*, 925 F.2d 1153,1157-58 (9th Cir. 1991) (emphasis added). An employer can be held liable for violations of IRCA if it "continues to employ an alien in the United States knowing the alien is unauthorized or has become unauthorized with respect to such employment." *Id*. at 1156, citing 8 U.S.C. § 1324a(a)(2). Employers share the burden of proving or disproving that a person is authorized to work. *Zamora v. Elite Logistics, Inc*., 478 F.3d 1160, 1177 (10th Cir. 2007).

APF had, at a minimum, constructive knowledge that the individual who provided verification documents for Diana Concepcion was likely not Diana Concepcion. Ramirez immediately identified the photos of Yazzmin Trujillo as the person she knew to be Diana Concepcion. In multiple Facebook posts, Trujillo refers to other Trujillos as her "papi" ("dad"), "hermanito" ("brother") and "Tia" ("aunt"). Concepcion's HR file indicated that her beneficiary

is a Trujillo, who also happens to live with her at the same address. (Tr. 795:11-15; 796:5-8; 797:16-21; 798:20-25; 799:10-25). The ALJ describes this as "'evidence' against Concepcion." (ALJD 38:fn 45). It is not. What it is part of the "facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition." 8 C.F.R. § 274a.1(1). Once Ramirez had a reasonable concern that the individual she knew as Concepcion was not who her immigration documents said she was, Ramirez complied with her IRCA obligations to exercise "reasonable care" to learn about the condition. To do otherwise required APF and Ramirez to turn a blind eye to possible identity verification fraud. IRCA demands otherwise.

That the ALJ chose to assail Ramirez for taking her compliance responsibilities seriously, given the immigration scrutiny APF works under, is unfortunate. The ALJ dismisses her "enthusiastic plunge" and "scour[ing]" as "wholly discretionary." (ALJD 38: n. 45). As three of its HR personnel testified, in the last several years, APF was subject to several ICE audits, one of which deprived it of half of its skilled workforce at a recently-purchased North Carolina plant. Neither Ramirez nor APF views its federal immigration law obligations as discretionary, and based on what she found when she clicked on the Trujillo Facebook page, Ramirez had a duty "to exercise reasonable care" to ascertain whether Concepcion was who she represented to APF and the federal government she was.

Notably, although determining that APF had no legal obligation to confirm Concepcion's identity, the ALJ's decision implicitly assumes that Trujillo and Concepcion are one in the same. If Trujillo were not Concepcion, than Ramirez's review of Trujillo's (a non-employee) Facebook page would have no implication under the Act, as her single act of "liking" the Facebook ad would not constitute protected concerted activity. See *Worldmark by Wyndham*; *KNTV, Inc*.,

supra. Only by impliedly concluding that Concepcion actually is Trujillo can the issue of employer surveillance even arise. But if Concepcion is indeed Trujillo, then the ALJ has placed APF in the untenable position of being forced to reinstate an employee who APF reasonably believes has falsified her identity and who refused to prove that she is lawfully eligible to work in this country. To obey his decision in effect forces APF to knowingly violate federal immigration law.

ii. There is No Evidence that APF's Request for Documentation from Concepcion was Motivated By Union Animus.

The question of whether APF violated the Act rests on its motivation in making the request that Concepcion confirm her identity. Here, there is simply no evidence that APF was motivated by Concepcion's union sympathies. To the contrary, Concepcion was given multiple opportunities to prove her identity, and was even offered monetary and other assistance by APF to help her obtain the requested documentation. It defies logic to conclude that APF targeted Concepcion and suspended her due to her union sympathies, and yet treated her more favorably than other non-union employees who had previously been required to provide similar identity documentation. The ALJ made at least two errors in this regard; first, he erred in concluding that APF's request to Concepcion was motivated by union animus; and second, he erred by refusing to consider whether APF would have made the same request of Concepcion absent any union organizing campaign.

The Board many years ago established the analytical framework for deciding cases turning on employer motivation in *Wright Line*, 251 NLRB 1083 (1980). Under that framework, to find a violation of Section 8(a)(3) here, a preponderance of the evidence must exist that Concepcion's protected conduct was a motivating factor in APF's request for documentation. If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the

employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089; *United Rentals, Inc*., 350 NLRB 951 (2007); *Donaldson Bros. Ready Mix, Inc*., 341 NLRB 958, 961 (2004). The elements of discriminatory motivation are union activity, employer knowledge, and employer animus. *Verizon & Its Subsidiary Telesector Resources*, 350 NLRB 542 (2007); *Group Farmer Bros. Co*., 303 NLRB 638, 649 (1991).

Contrary to the ALJ's conclusion, the General Counsel did not meet its required *prima facie* showing. No evidence exists that Concepcion's protected activity motivated APF's request to confirm her identity. Here, Concepcion's protected activity was her participation in the radio broadcast. Ramirez, however, never heard the broadcast and provided unrefuted testimony that she did not know that Concepcion was a participant in the LaMega broadcast at the time she clicked on Yazzmin Trujillo's Facebook page. It was at that point (and not before) when she saw Concepcion's photo that she put two and two together to conclude that Trujillo may very well be Concepcion. This was a logical conclusion, based on the photo, the connection between the radio broadcast, and the "another lady named Diana" reference in the email. However, APF's request that Concepcion confirm her identity was motivated only by what was plainly obvious to Ramirez: that the posted pictures of Yazzmin Trujillo on Facebook were photos of the employee she knew as Diana Concepcion.

To try to explain her puzzlement over the identity issue, Ramirez investigated in good faith before taking action. She looked further at the Facebook page, learning that Trujillo referred to other Trujillos on Facebook as her dad, brother and aunt, and determined that Concepcion's benefit file indicated that her beneficiary (and housemate) is a Trujillo. These

circumstances created a reasonable suspicion in Ramirez's mind that Concepcion could very likely be Yazzmin Trujillo.

Even armed with this information, Ramirez did not immediately suspend Concepcion. Instead, she acted cautiously by informing Chuck Aardema, whose immediate reaction was extraordinarily telling. Having put two and two together, she advised Aardema that Concepcion was a Union supporter, so he would have the full facts. Aardema's reaction was measured and wholly appropriate -- he asked Ramirez whether any past practice existed at the Company. She replied that she dealt with two similar circumstances by asking them for documentation. Aardema then directed Ramirez to follow the past practice and ignore Concepcion's Union support. (Tr. 825:15-18; R. Ex. 8). And that is exactly what Ramirez did, except that gave Concepcion much more time and opportunity to supply the documents than she did the two other employees who were not known to be Union supporters. Based on these record facts, the request made of Concepcion to confirm her identity was not motivated by an intent to punish or single-out Concepcion due to her Union support.

The ALJ ignored these facts, concluding instead that because Ramirez sought to listen to the LaMega radio broadcast shortly after learning about it, her actions must have been motivated by animus. In addition, the ALJ astonishingly construed Ramirez's placid email to Aardema that "she has news to share" as "enthusiasm that is hard to miss." (ALJD 35:18-21). No such testimony was provided by any witness to corroborate the context read into the email by the ALJ.

That the ALJ missed the distinction that, at the time of her click on the Trujillo Facebook page, Ramirez had no reason to suspect that Trujillo was Concepcion, is further evidenced by his misguided *Wright Line* analysis. He writes, "and in terms of *Wright Line* analysis, one must include in that the Respondent's suspicion -- whether correct or not -- that Diana Concepcion

(and not Yazzmin Trujillo) had "liked" the LaMega Facebook posting about the union radio broadcast." (ALJD 34:33-35). This huge leap is wholly unsupported by the evidence, at least at the only point in time that matters -- when Ramirez clicked on the Trujillo Facebook page. This unwarranted supposition shows how confused the ALJ was about the timing implications of Ramirez's activities on June 16.

The ALJ's conclusion that APF's request for documentation was motivated by union animus is belied by other facts. No other Union supporter, including Sonia Guzman (who also participated in the radio show), was asked to confirm their identity. Moreover, Guzman did not allege any unlawful treatment by APF after the June 16 radio show. Precisely because Concepcion was a Union supporter, she was given multiple chances to provide the requested documentation, and was even given additional advantages to assuage the Company's concerns, such as having paid time off to concentrate on obtaining a valid Puerto Rican birth certificate, as well as expedited shipping of the birth certificate at the Company's expense. Moreover, the ALJ's finding of general union animus by APF is easily dispelled. In fact, the full sum of the alleged animus by APF (outside of the request for documentation from Concepcion) amounts to a mistakenly-posted superseded 2001 solicitation policy and three verbal warnings issued in early June based on the superseded policy, one of which APF rescinded immediately and one of which was never actually issued. As to the solicitation policy, such unintentional error can hardly be the basis for animus. To construe animus from these minor incidents, from amongst 600 plus employees, is clear ALJ error.

iii. APF Followed Its Historical Practices In Requesting That Concepcion Confirm Her Identity.

Even if the General Counsel could make its *prima facie* case under *Wright Line*, APF demonstrated that it would have requested documentation from Concepcion to confirm her

identity even in the absence of her protected conduct. However, the ALJ did not consider this compelling evidence, because he held that APF's alleged unlawful surveillance precluded it from asserting this affirmative defense. This holding misconstrues *Wright Line* and is unsupported in law.

In refusing to consider APF's defense, the ALJ relied on *Supershuttle of Orange County, Inc.*, 339 NLRB 1 (2003). This reliance is misplaced. In that case, the Board found that the employer's antiunion animus toward the employee led to the investigation in which the employee made false statements, prompting his discharge. The Board held that since the investigation was unlawfully motivated, there was a "clear and direct connection between the employer's unlawful conduct (its antiunion animus) and the reason for discipline." Here, there is no such "clear and direct connection." No Union-motivated "investigation" led to Concepcion's suspension. Ramirez was not investigating Concepcion or any APF employee when she clicked on Trujillo's Facebook page. She was trying to understand why a non-employee was interested in the Union campaign at APF. Her inadvertent discovery of Concepcion's real identity led to the request for documentation.

As previously discussed, the alleged unlawfulness of the review of Trujillo's Facebook page has already been dispelled. Likewise, claims of particularized or general union animus by APF have also been debunked. Finally -- and most obviously -- Concepcion would never have been suspended had she simply provided valid documentation to confirm her identity in response to one of the many requests. Rather than do so, she concentrated on other "important" matters, such as lying about it to Ramirez, and then taking it down to cover her tracks. Only when she refused to provide the legal documents was she suspended.

When properly considering APF's affirmative defense under *Wright Line*, APF's evidence established that Concepcion was treated the same way as other employees who were not Union supporters in very similar situations where questions of identity have arisen. The factual patterns of both prior situations were remarkably similar to Concepcion's. Both also involved information from Facebook coming to Ramirez, leading her to have reasonable identity concerns. Historically, when situations have arisen resulting in a reasonable concern that employees may not be who they claim to be for employment purposes, in conjunction with its legal obligation (*Mester Manufacturing Co.*, 879 F.2d at 563-66), it has been the Company's practice to request additional evidence to prove that the I-9 documentation provided at the time of hire was valid.

APF presented uncontroverted evidence that in two prior but separate situations, years before the Union campaign began, Ramirez requested additional documentation to confirm the identities of two employees, Johan Rivera Roque in 2012 and Edison Cresbo in 2013. These requests came after Ramirez discovered that both were using different names on Facebook than who she knew them to be at work. In 2012, when Johan Rivera Roque's identity was called into question by a Facebook post, Ramirez established the process which she would later twice follow: she gave Rivera Roque eight days to bring in documents proving her identity. When Rivera Roque brought in an invalid Puerto Rican birth certificate, she gave Rivera Roque another eight days to secure the documentation. When she failed to do so, Ramirez fired her. In 2013, when Ramirez learned Cresbo's workplace identity did not match the name he used on Facebook, Ramirez followed the exact same process. Cresbo failed to meet that second deadline and was discharged, like Rivera Roque.

In June 2015, when Ramirez was for the third time faced with the exact scenario, this time concerning a known Union supporter, she took refuge in the process she had previously followed, knowing that her every move would be scrutinized. Chuck Aardema plainly reinforced to Ramirez that she needed to apply the same process to Concepcion: "be sure we're approaching this regardless of her (Union) views in that regard and in the same manner as we would otherwise." (Tr. 825:15-18; R. Ex. 8). It was good advice, and Ramirez followed it.

Concepcion's protected activity actually placed her in a *more* favorable position than the two non-Union employees. APF undeniably treated Concepcion more generously than it did Rivera Roque and Cresbo. To make it easier for Concepcion to fulfill the verification request, Ramirez gave Concepcion the option to use paid time off while pursuing the valid birth certificate or other forms of identification. Ramirez also gave Concepcion a website address from which she could quickly obtain a new Puerto Rican birth certificate, and even offered to pay for express shipping to expedite the process. Concepcion had more time (twelve business days) -- or until July 17 -- to provide a valid birth certificate from Puerto Rico, or other acceptable identification. None of these offers were made to Rivera Roque or Crespo. Despite Concepcion's quick, initial response to the Company by providing the invalid birth certificate, when APF advised her it was unable to accept that documentation (just as it had twice before), her willingness to comply abruptly ended. She continued to work during the 12-day period but put forth absolutely zero effort thereafter to secure a valid birth certificate. Concepcion never advised the Company why she was willing to provide the invalid 2003 birth certificate, but utterly refused to secure a valid one. (R. Ex. 14). On July 17, when Concepcion failed to provide any other documentation to the Company to confirm her identity by the deadline, and did

not disclose any steps she had taken to even attempt to begin the process of obtaining a new birth certificate, she was suspended indefinitely.

The policy implications of following the ALJ's reinstatement remedy for Concepcion would place APF on the horns of a dilemma -- should it reinstate an employee about whom it has reasonable doubts is authorized to work in the United States who, despite multiple chances, has not demonstrated that she is authorized, or ignore the remedy. The ALJ's decision must be overturned to avoid this material conflict in federal law.

I. Whether the ALJ Improperly Found that APF's Assessment of a Single Attendance Point to Jessenia Maldonado Violated Section 8(a)(1) of the Act. Exceptions 55, 56, 57, 58, 59, 63, 64.

The General Counsel alleges, at paragraphs 5(a)-(c) and 6(a)-(b) of the Complaint issued in Case No. 09-CA-162392, that APF violated Sections 8(a)(1) and (3) of the Act when it issued Maldonado one attendance point for a day where she was absent, but was engaged in a one-day unfair labor practice strike. The General Counsel at hearing did not pursue an 8(a)(3) theory of violation, as the ALJ found. (ALJD 42: n. 49). The ALJ found merit to the 8(a)(1) claimed violation, but that finding was erroneous because there is no corroborated evidence that Maldonado informed APF that she was absent due to her participation in the strike, and the ALJ's crediting of Maldonado on this particular point was unreasonable.

Having discovered a "call-off/strike script" left in the ladies' locker in the days prior to July 17, the Company was aware that some employees could be planning to strike. To ensure that any strikers did not get assessed an attendance point in violation of the Act, Ramirez instructed the Manufacturing Coordinators to denote by asterisk in the call-off sheet the employees who used the call-off/strike script or referenced the Union protest in their call-off voicemail message. (Tr. 1093:15-22). The basis for this instruction was to ensure that no points would be issued to those who engaged in protected activity by striking. The July 17 daily call-off sheet establishes there was

no asterisk next to her name, which meant that she was one of 15 employees who called in without mentioning the strike. Ramirez testified that the purpose of the asterisk was to denote who used the script or referenced the strike. (R. Ex. 36; Tr. 1093:15-22). At the hearing, the ALJ excluded only the asterisks pursuant to F.R.E. 803(6)[13], but otherwise admitted the July 17 call-in sheet. Also admitted was Ramirez's testimony that based on the lack of an asterisk, Maldonado, along with 15 or so other employees, called in without using the script and were assessed an attendance point. (Tr. 1103:19-1106:1).

Given that Maldonado testified that she called in not once and used the script, but three times, the ALJ was faced with a dispute. To resolve that dispute, he claimed that Maldonado's testimony was disputed only by "hearsay evidence in the form of the lack of an asterisk . . . ." (ALJD 40:44-45). This is incorrect. Ramirez's testimony was not hearsay, and the Maldonado entry had no asterisk. Finding the asterisk to be hearsay and ruling them inadmissible does not mean that the lack of an asterisk is hearsay as well. But this is exactly what the ALJ held, and that ruling and his decision to credit Maldonado over the admissible, record evidence was a mistake. Moreover, the ALJ actually disbelieved critical parts of Maldonado's testimony. Maldonado's testimony was that she called in three times on July 17, a claim that the ALJ outright rejected as not "hav(ing) the ring of truth." (ALJD 41: n. 47). The ALJ next described a factual dispute as "not particularly material" when Maldonado claimed that the following week, she went to Ramirez's office to ask about the points, and that when Ramirez told her she was assessed a point for July 17, Maldonado said, "Okay. Thank you very much." (Tr. 1077:3-4). Ramirez denied the meeting ever happened. Maldonado's testimony is implausible. It is highly unlikely that when told she received

[13] The asterisks should have been admitted as a record of regularly conducted activity. The asterisks are likely also a present sense impression per F.R.E. 803(1).

an attendance point for July 17 after allegedly going to HR to check on that very point, she fully accepted that point without argument and thanked Ramirez on the way out the door.

Moreover, APF's treatment of these nine employees who did call-off using the Union call-off/strike fully script demonstrates that it understood its legal obligations, took protective measures to ensure compliance therewith, and did not retaliate against employees who conveyed to the Company that they were engaged in protected, concerted activity. The ALJ did not consider why Maldonado would be specifically and singularly excluded from the Company's protection of strikers. In fact, she was not. Maldonado was treated like an absent non-striker because -- until she filed the unfair labor practice charge months after her absence -- she never conveyed to APF that the reason for her absence was related to the Union strike. As a result, the General Counsel failed to prove any violation of Section 8(a)(1) as it pertains to Maldonado. The ALJ's machinations to find a violation by crediting Maldonado's unbelievable testimony over record evidence were in error.

J. Whether the ALJ Erred in Concluding that the CATS Program Constituted an Unlawful Solicitation of Grievances and Implied Promise to Remedy Grievances in Violation of Section 8(a)(1). Exceptions 60, 61, 62, 63, 64.

The ALJ's conclusion that the CATS program was an illegal solicitation of grievances is erroneous for two reasons -- one, APF had decided to implement the program before the Union drive began, and two, the ALJ's conclusion that APF was therein promising to remedy the grievance was based on his misinterpretation of testimony.

To facilitate the introduction of CATS, Sterwerf initially spoke with Dwayne Stanford, her Operations Manager, about the best way to implement LEAN manufacturing concepts and tools, including CATS, at the plant.[14] (Tr. 717:19-718:15). Stanford also addressed the CATS implementation with Ramirez in March, 2015. (Tr. 698:3-12; 870:2-13; 871:11-17; R. Ex. 17).

[14] Other LEAN tools were also implemented by Sterwerf in February 2015, including having interpreters at safety meetings, creation of standardized work training, problem-solving training, and adopting of a communication change form. (Tr. 721:1-17).

Though CATS was announced and actually implemented after the Union had begun to flyer at the Cincinnati plant, Sterwerf laid the groundwork with her relatively new cohorts at APF months before the Union began its campaign. Sterwerf testified that her decision to announce the CATS program was not influenced in any way by the Union campaign. (Tr. 727:16-728:2). *Greenbrier Valley Hospital*, 265 NLRB 1056, 1056 (1982) (dismissing 8(a)(1) violation where decision-making process was "fully under way" before onset of organizing).

The Board has recently held that the lawfulness of a benefit confirmed during a union campaign depends on the employer's motive. *Vista Del Sol Healthcare*, 363 NLRB No. 135, slip op. at 1 fn. 2 (2016). "The Board infers improper motive and interference with employers' Section 7 rights when an employer grants benefits during an organizing campaign without showing a legitimate business reason." *Id.* APF made that showing through the frank testimony of Petra Sterwerf. She testified about the communication void at the plant. As Ramirez added, if an employee wanted to find out how many vacation days they had available, he/she had to take their break or lunch time to do it. (Tr. 869:12-15). It was this communication gap, evidenced by the eight-year old suggestion found in a lone suggestion box, not the Union campaign, that prompted CATS as one of several changes designed to improve communications on the floor of the plaint. (Tr. 721:1-17).

The ALJ's second error concerning CATS involved his conclusion that APF impliedly promised to remedy the grievances raised through CATS. The evidence he relied upon to reach this conclusion was APF's response to the first CATS form submitted by Ronnie Fox on July 21, 2015. (G.C. Ex. 15). In his form, Fox complained about the attendance points policy and suggested a change. Ramirez spoke with Fox in response to his CATS submission form and informed him that the Company had been, for some time, reviewing the attendance points system Company-wide. (Tr.

155:19-156:18). This statement, described by Fox "they're working on it," was misconstrued by the ALJ. Fox was not told that, in response to his CATS form that APF had begun a review of its attendance policy. To the contrary, Fox was told that at the point he submitted his CATS form, APF was already in the midst of a Company-wide analysis of its attendance policy, and that such review had been going on for some time. The ALJ misconstrued this testimony to mean that APF would "work on" the attendance policy, thereby remedying Fox's problems with it. This is not what Ramirez said or meant. His misconstruing the Ramirez answer allowed him to rely on *Desert Spring Hosp. Med. Center*, 361 NLRB No. 43 (2014) to find CATS to be an unlawful reference of remedial action. APF did not make (and has not made) any change to its attendance policy in response to Fox's CATS submission. (Tr. 732:13-17). Sterwerf's intent in announcing and rolling out CATS was not to imply the changes requested by employees would be made. It was just as the July 15 rollout memo stated -- "a way for your to express questions, concerns, thoughts, and ideas and to ensure that your requests are addressed in a timely manner." (G.C. Ex. 26).

K. Whether the ALJ's Remedy of Back Pay to Diana Concepcion (a/k/a Yazzmin Trujillo) is Permissible, Given Her Failure to Provide Requested Documentation to Validate Her Identity. Exceptions 18-54.

While the Act applies to undocumented workers, federal immigration policy, as expressed by Congress in IRCA, forecloses the Board from awarding backpay to an undocumented alien who has never been legally authorized to work in the United States. Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002) (Board found employer had selected the employee and others for layoff in order to rid itself of known union supporters, but because the employee, who had originally presented documents that appeared to verify his authorization to work in the United States, admitted that he had never been legally admitted to, or authorized to work in the United States, employee was not entitled to an award of backpay). At this point, Concepcion has not

provided any evidence of her ability to lawfully work in this country. Because she cannot do so, an award of backpay, including consequential damages, is inappropriate.

VI. CONCLUSION

For the reasons stated above, Respondent AdvancePierre Foods submits that its exceptions to the Decision of the ALJ should be granted, and that pertinent parts of the Amended Complaints should be dismissed.

Dated this 25th day of July, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2016, I electronically filed the foregoing through the National Labor Relations Board website (www.nlrb.gov).

I further certify that a copy of the foregoing was served via U.S. Mail on July 25, 2106 on the following:

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I further certify that a copy of the foregoing was served upon the following via email on July 25, 2016:

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